Office-Supreme Court, U.S.
FILED
SEP 19 1983
ALEXANDER L. STEVAS,
CLERK

Case No. 83-113

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation,
Petitioner,

v.

CHARLES WILLIAM PROFFITT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER FILED PURSUANT TO SUPREME COURT RULE 22.6

JIM SMITH
ATTORNEY GENERAL

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Flroida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the precepts Gardner v. Florida, 430 U.S. 349 (1977) require the sentencing authority to allow the cross examination of the authors of any psyciatric reports submitted to the sentencing authority even when those reports are not questioned or disputed by the prisoner or even considered by the sentencing authority.

2. Whether a court of appeals can prevent a district judge, sitting in habeas, from considering a disclaimer by a state trial judge via a written response duly recorded in state court proceedings and/or a disclaimer contained in a desposition, which deposition was introduced in evidence, without objection, by the habeas petitioner himself.

3. Whether a capital defendant's presence is so nonwaivable that his counsel may not waive his presence even at a post trial ad hoc hearing.

4. Whether a death sentence is, necessarily, constitutionally infirm simply because the sentencing authority considers non-statutory aggravating factors or because one or more of the statutory factors is infirm if there is at least one valid statutory factor, no mitigating circumstances and where the Supreme Court of Florida independently reviews and reweighs the sentence and determines it to be proper.

5. Whether a Circuit Court of Appeals may ignore the precedents and findings of the Supreme Court of the United States and substitute its judgment for that of this Court regarding aggravating and mitigating circumstances in the same capital case.

6. Whether a United States Circuit Court of Appeals may reverse a District Court's denial of habeas relief in the absence of fundamental error or manifest miscarriage of justice.

TABLE OF CONTENTS

PRELIMINARY STATEMENT	1-2
ARGUMENT	2-4
CERTIFICATE OF SERVICE	5

TABLE OF CITATIONS

	Page
Barclay v. Florida, 33 Cr. L. 3292 (1983)	2
Brown v. State, 381 So. 2d 690 (Fla. 1980)	3
Elledge v. State, 346 So. 2d 998, (Fla. 1977)	3
Henry v. Wainwright, 661 F. 2d 56 (1981)	3
Proffitt v. Wainwright, 685 F. 2d 1227 (11th Cir. 1982)	4

Case No. 83-131

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation,
Petitioner,

v.

CHARLES WILLIAM PROFFITT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER
FILED PURSUANT TO
SUPREME COURT RULE 22.6

PRELIMINARY STATEMENT

Petitioner files this Supplemental Brief pursuant to Supreme Court Rule 26.6 for the purpose of calling attention to a new case decided on

July 6, 1983, while the Petitioner's Petition for Writ of Certiorari was at the printer; viz: Barclay v. Florida, Case No. 81-6908.

ARGUMENT

The decision of the Court of Appeals Eleventh Circuit, in the instant case, in its answer to questions 4 of the questions presented, is in direct conflict with the above cited decisions of this court in the following particulars. In Barclay, this Court answered the following question in the affirmative:

> ". . . whether Florida may constitutionally impose the death penalty on petitioner, Elwood Barclay when one of the "aggravating circumstances" relied upon by the trial judge to support the sentence was not among those established by the Florida death penalty statute."
>
> 33 Cr. L. 3292 (1983)

On the other hand the Eleventh Circuit answered the same question in the negative; saying:

> "In considering appellant's "propensity to commit [murder]" and the danger he posed to society, the trial court transcended the list of aggravating factors set forth in the Florida statute and substituted his own judgment of what circumstances justify capital punishment for that of the Florida Legislature. In so doing, the trial judge not only committed error under the state law. see Brown v. State, 381 So.2d 690, 696 (Fla. 1980); Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977); he also exceeded the federal constitutional limitations imposed by Furman on capital sentencing by increasing the risk that the death penalty would be imposed in an arbitrary and capricious manner. In short, we agree with the Henry court that because "the limitations of the statute make the death penalty constitutional. . . [i]gnoring those limitations []implicates the constitution" Henry v. Wainwright, 661 F.2d at 60. For reasons just stated, we conclude that the trial judge's reliance on nonstatutory ag-

> gravating circumstances renders appellant's sentence unconstitutional under the eighth and fourteenth amendments."
>
> Proffitt v. Wainwright, 685 F.2d 1227, 1267-1268 (11th Cir. 1982).

Without a doubt this Court and the Eleventh Circuit are at odds on the same question. We submit that this calls for summary reversal of the Eleventh Circuit with respect to question 4.

Respectfully Submitted,

JIM SMITH
ATTORNEY GENERAL

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street
Park Trammell Building
Suite 804
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Petitioner, and a member of the Bar of the United States, hereby certify that on the _____day of 1983, I served three copies of the Supplemental Brief of Petitioner Filed Pursuant to Supreme Court Rule 22.(6) on Kathryn Emmett, Esq., 8 Phesant Lane, Stamford, Connecticut, 06903, Mr. David Golub, Esq., Silver, Golub and Sandak, 733 Summer Street, Stamford, Connecticut, 06905, and Deborah Fins, Esq., Suite 2030, 10 Columbus Circle, New York, New York, 10019, by a duly addressed envelope with postage prepaid.

CHARLES CORCES, JR.
Assistant Attorney General